



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME, Council 93, Local 3657, Hillsborough
County Nursing Home Employees

Complainant

v.

Hillsborough County Nursing Home

Respondent

*
*
*
*
*
*
*
*
*
*
*

Case No. A-0426-50

Decision No. 2001-049

APPEARANCES

For AFSCME Council 93, Local 3657 – HCNH Employees:

Daniel Cocuzzo, Esquire

For Hillsborough County Nursing Home:

Carolyn Kirby, Esquire

Also appearing:

Jack McMath, NH Coordinator, AFSCME Council #93
Gary W. Wulf, Consultant, Hillsborough County Nursing Home
Harriett Spencer, Staff Representative, AFSCME Council #93
Lorraine Croteau, Hillsborough County Nursing Home
Gloria Plowell, AFSCME, Local 2715
Bruce Moorehead, Business Administrator, Hillsborough County Nursing Home
Carol Holden, Hillsborough County Nursing Home

BACKGROUND

The American Federation of State, County and Municipal Employees (AFSCME), Council 93 (Union), on behalf of its Local 3657 representing Hillsborough County Nursing Home (HCNH) employees, filed unfair labor practice (ULP) charges on November 22, 2000, against Hillsborough County Nursing Home alleging violations of RSA 273-A:5 I (b), (c), (e) and (h) resulting from breach of contract and failure to bargain in good faith by unilaterally implementing a fact finder's report during post-fact finding negotiations. Hillsborough County, by and on behalf of its Nursing Home, filed a response on December 7, 2000. The parties thereafter participated in a pre-hearing conference with a PELRB representative on December 21, 2000, the results of which may be referenced in Decision No. 2000-127 which is a Pre-Hearing Decision and Order resulting from that meeting. This matter was thereafter scheduled for hearing before the PELRB on three occasions, the first two of which were continued because of weather or at the request of the parties on February 6, 2001 and April 5, 2001, respectively. By agreement of the parties, this matter was heard by the PELRB on Thursday, May 17, 2001, at its offices in Concord, New Hampshire with both parties being represented by counsel, as indicated above. The parties both made opening statements during which time the Union stated that the issues of retroactivity had been resolved. The Union proceeded to examine its one and only witness and then rested. The respondent then moved that this matter be dismissed for failure to state a claim.

FINDINGS OF FACT

1. Hillsborough County operates Hillsborough County Nursing Home and, in so doing, employs personnel thus making it a "public employer" within the meaning of RSA 273-A:1 X.
2. The American Federation of State, County and Municipal Employees (AFSCME), Council 93, Local 3657 is the certified bargaining agent for a broad-based unit of full-time and regular part-time administrative, health care, support and maintenance employees at HCNH described in a unit certification document most recently amended and placed on file with the PELRB on March 13, 1998.
3. The County and the Union were parties to a collective bargaining agreement, in which the Union was identified as Local 2715, for the period July 1, 1995 to June 30, 1999 and which continued in *status quo* effect at all times pertinent to these proceedings until such time as a successor agreement was concluded between them.
4. Prior to and continuing beyond the conclusion of the 1995-99 agreement, the parties entered into negotiations for a successor agreement. In the course of those negotiations, they reached impasse causing the Union to file a request for fact finding on June 29, 1999. Thereafter, John Baraniak was appointed fact finder on July 15, 1999 in Case A-0426:41. Fact finding proceedings were held commencing with an initial meeting on

September 22, 1999 followed by several additional meetings, as recounted in the fact finder's report.

5. The fact finding process was completed and the fact finder issued his report on December 3, 1999. (Joint Ex. No. 1.) That report examined and made recommendations on nine separate issues or areas. Pertinent to this ULP are the issues involving wage adjustments, identified as Issue No. 8, and medical plan cost sharing, a/k/a increase in employees' contributions to health insurance, identified as Issue No. 9. The fact finder recommended wage adjustments of 4% on January 1, 2000, 2.5% on July 1, 2000 and 2.5% on January 1, 2001. On the issue of employee contributions to health insurance premiums, currently 10% under the 1995-99 CBA, he recommended that they be increased to 20%. (Joint Ex. No. 1, p. 24.)
6. The issue of increased contributions for health insurance, to be 20% under the new contract, was not acceptable to the union membership which rejected the fact finder's report. The County, in the form of its legislative body, namely, the County Delegation, approved the fact finder's report on February 9, 2000. During and immediately after the fact finder's report was issued, union representation for this bargaining unit changed from James Anderson to Harriett Spencer. Ms. Spencer was the person with whom the local president, Gloria Plowell, conferred about the fact finder's report.
7. The Union, which never signed a successor agreement predicated on the fact finder's report, made attempts at small adjustments to that report as evidenced by a memo from Spencer to County negotiator Gary Wulf on May 12, 2000, involving calculations, language items beyond the purview of the legislative body, and a "reliable vendor" issue. (Exhibit E to ULP.)
8. On or about June 7, 2000 the parties, inclusive of HCNH Administrator Bruce Morehead, Wulf, Plowell, Spencer and others, met to discuss outstanding differences in their positions after the issuance of the fact finder's report. Plowell testified that, during the course of this meeting, she told management that she was accepting the fact finder's report. Notwithstanding this, when she testified about the successor contract, she said she "couldn't sign it if we were going to pay retroactive for the insurance."
9. On or about August 1, 2000, the employees in the bargaining unit received paychecks which reflected a 20% contribution rate for their share of health insurance premiums as well as increased compensation reflecting a general pay increase, cost of living adjustments and retroactive step increases relating to placement on the salary scale which had remained static during the course of negotiations
10. The only evidence of the Union's on-going dissatisfaction with the fact finder's report has been the filing of the unfair labor practice complaint on November 22, 2000. The Union's last prior "official" statement of record about the then pending implementation of the fact finder's report occurred on June 7, 2000 when Plowell spoke of the acceptance of that document. Both the conduct of the Union and of the bargaining unit members after that date and until the filing of the ULP on November 22, 2000 gave the appearance of

acceptance of the fact finder's report including their acceptance of changes in wages, which were higher, and in benefits which, in the case of health insurance, were lower. There is no evidence of a refusal to accept or of a conditional acceptance of wage increases, either by the Union or by the employees. Increases in compensation in the form of adjustments to wages were enjoyed immediately upon the County's implementation of the fact finder's report. Neither the Union nor the employees rejected the change in wage-related compensation nor did they take any action to cause those benefits to be segregated, placed in escrow or to be otherwise identified and kept apart pending the outcome of litigation about the alleged unilateral implementation of the fact finder's report.

DECISION AND ORDER

The ULP in this case involves four separate charges. Count I relates to the unilateral implementation of changed wages and working conditions. Count II charges a refusal to bargain in good faith. Count III involves "reneging on contract term" because retroactive raises and steps allegedly were not paid promptly. Count IV charges retaliation, presumably under RSA 273-A:5 I (b) and (c). Issues of retroactivity have been resolved pursuant to the opening statement of the Union's attorney. The remaining issues are subject to the County's Motion to Dismiss because the Union failed to state a claim. We grant that Motion to Dismiss.

In order to prevail in an unfair labor practice proceeding, the complainant must prevail by a preponderance of the evidence. Rule PUB 201.06 (b). In this case, the complainant's case was submitted after the examination and cross-examination of its one witness. That witness testified that, on or about June 7, 2000, during a meeting with the members of the negotiating teams for each side, she reported that she, supposedly acting for the Union in her capacity as president of the local, was accepting the fact finder's report. The conduct of each side thereafter reflected their acceptance and belief in the accuracy of that report, both as to the County's implementation of the wage and benefit provisions of the report and as to the Union membership's acceptance of wage and benefit increases as explained in Finding Nos. 9 and 10.

Given the simple facts of this case and considering when specific actions occurred, namely on June 7, 2000, we cannot find that there has been a unilateral change in wages and working conditions such as to constitute a violation of RSA 273-A:5 I (e), (h) or (g), the last of which was not plead. The Union, through its president, announced acceptance of the fact finder's report. The County responded appropriately, and, several months after receiving this news, implemented the fact finder's report. The County implemented, as best as the record shows, the fact finder's report. There is no claim that the County deviated from that document nor is there evidence that it did so. RSA 273-A:12 IV provides that "if the impasse is not resolved following the action of the legislative body, the negotiations shall be reopened." The record in this case gives every appearance of an announcement that the "impasse" was resolved as of the time the union president announced the acceptance of the fact finder's report on June 7, 2000. That being the case, there was no need for "reopening" negotiations, within the meaning of RSA 273-A:12, after that date. Likewise, there is no evidence that any such request was ever made. Count I cannot be sustained; the requisite preponderance of the evidence is missing.

Once Count I cannot be sustained, the house of cards falls in on itself. Count II, involving a refusal to bargain in good faith, also fails because (1) there was no on-going obligation to bargain, (2) that obligation ceased when the Union, through its president, announced the acceptance of the fact finder's report, and (3) the impasse process contemplated under RSA 273-A:12 was complete in both appearance and function. The same is true of Count III pertaining to retroactivity which was resolved either by the stipulation of the complainant during opening remarks or by its failure to produce any evidence on this issue during the hearing. Finally, the "retaliation" charge of Count IV was neither supported by the evidence nor by the requisite "retaliatory motivation" to support the claim. Appeal of Professional Firefighters of East Derry, 138 N.H. 142 (1993).

Respondent's Motion to Dismiss is GRANTED.

So ordered.

Signed this 7th day of June 2001.



DORIS M DESAUTEL
Alternate Chairman

By unanimous decision. Alternate Chairman Doris Desautel presiding with members Seymour Osman and Richard E. Molan present and voting.